Filed 1/13/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALLEN THOMAS AYERS, Defendant and Appellant.	F044982 (Super. Ct. No. BF103511A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John L. Fielder, Judge.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION AND FACTUAL OVERVIEW

At approximately 11:00 p.m. on August 13, 2003, defendant Allen Thomas Ayers visited Marisa M. at her apartment. Marisa and defendant had been living together "on

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

and off" for the past four years and she is the mother of defendant's two youngest children. They began arguing. Defendant repeatedly struck Marisa on the face and head. During the week following the incident, Marisa told police officers and others that in addition to striking her, defendant also forced her into a bathroom where he hit her, choked her, tied her up, held a knife to her throat and threatened to kill her (the August incident).

It was decided during the early morning hours of August 14 that defendant would take Marisa and their children to the coast. On the way, defendant stopped to purchase cigarettes. After he left the car, Marisa ran into a nearby store and asked someone to call 911. An unidentified store clerk telephoned 911 for emergency assistance; the clerk's conversation with the dispatcher was recorded (the 911 call). The police arrived soon thereafter. After taking Marisa's statement, the responding officer took photos of her face and gave her some pamphlets describing the services available from the Alliance Against Family Violence (AAFV), an organization that assists abused women. Marisa telephoned the AAFV hotline later that day. She went to the police station on the following day so that more photos could be taken of her injuries. She signed an application for a restraining order in which she described the August incident and an incident that had occurred in July 2003 during which defendant grabbed her around the neck, choked her and forced her into a closet. On August 19, 2003, Marisa visited a shelter for abused women that is operated by AAFV, where she spoke with a case manager.

As a result of the August incident, an information was filed charging defendant with spousal battery, making terrorist threats and false imprisonment; deadly weapon use enhancement allegations were attached to the battery and threat counts.

Jury trial was held. At that time, Marisa was on "very friendly" terms with defendant. Although she testified that defendant had repeatedly struck her on the face, she recanted most of the other statements she had made concerning the August incident

and the uncharged prior abuse. She blamed herself for the August incident, testifying that she had been drinking and was the initial aggressor. Defendant testified that he slapped her in the face a few times because she had pushed and slapped him. Over defense objections, the court admitted two records maintained by AAFV -- a portion of a crisis intervention log and a client intake data form (the AAFV forms), the audiotape and transcript of the 911 call and expert testimony about battered women's syndrome (BWS).

Defendant was found guilty of spousal battery. (Pen. Code, § 273.5, subd. (a).) He was acquitted of the other two counts and the special allegations were found not true. He was sentenced to the middle term of three years' imprisonment.

Defendant challenges the spousal battery conviction on several grounds, arguing inter alia: (1) the AAFV forms were not admissible under the business records exception to the hearsay rule to prove the circumstances of the August incident; and (2) the trial court erred by denying his request for modification of CALJIC No. 9.35 to specify that the corporal injury must be "unlawful." In the published portion of this opinion, we first demonstrate that while the AAFV forms were not admissible to prove the truth of their contents because they contain two layers of hearsay and there is not an applicable exception to the hearsay rule for each layer, defendant was not prejudiced by entry of the AAFV forms into evidence. Next, we explain that refusal to modify CALJIC No. 9.35 did not constitute instruction error and, in any event, the asserted defect in the jury charge is harmless beyond a reasonable doubt. Defendant's other challenges to the conviction are rejected in the unpublished portion of this opinion. We will affirm.

DISCUSSION

I. Although the AAFV forms should not have been admitted under the business records exception to the hearsay rule to prove the circumstances of the August incident, the resulting error was harmless.

A. Factual Background

Sarita Esqueda is employed by AAFV as a shelter coordinator. She testified out of the presence of the jury that when Marisa telephoned the AAFV hotline on August 14, the contents of her conversation with an AAFV employee were recorded in a document known as the crisis intervention log. When Marisa visited the shelter on August 19, an AAFV case manager interviewed her and completed an intake form. The AAFV forms were completed using information provided by Marisa and they reflect statements Marisa made about the August incident.

The prosecutor moved to permit the AAFV forms to be admitted into evidence. Defense counsel objected, arguing that the documents were not properly authenticated, lacked foundation and "are also double hearsay. Not only is the document hearsay, but then within the document there are hearsay statements from [Marisa]." The court ordered the AAFV forms excised to remove references to defendant's possible alcohol or drug use and it required the prosecutor to establish that Esqueda was AAFV's custodian of record. "[A]ssuming that [the prosecutor] can lay that foundation, … then we'll admit those exhibits with those changes."

Thereafter, Esqueda testified on direct examination that she was the custodian of records for AAFV. She explained that the two AAFV forms are completed by AAFV employees using information that the client provides. The AAFV forms are maintained in AAFV files and are relied on by AAFV employees.

Defense counsel declined to cross-examine Esqueda but renewed her "objection. Lack of foundation." The court overruled the objection and received the AAFV forms into evidence.

A short while later, the court informed counsel that the AAFV forms would not be shown to jurors or provided to them during deliberations because of difficulties it was experiencing in redacting the AAFV forms.

The prosecutor summarized a portion of the crisis intervention log during her closing argument, as follows:

> "… [I]n [the AAFV forms], … she actually outlines all the abuse that the defendant has been responsible for. But I would ask that you look at People's Exhibit No. 34 which is the crisis intervention log. And this is dated August the 14th at about 9:55 in the morning.
>
> "Okay. Now, this is after -- based upon the testimony, after she spoke to law enforcement, after they gave her the pamphlets regarding battered women. This shows you that she called the hotline.
>
> "And on page 2 of this report, she goes on -- which is, once again, look at her actions. She goes and she says beat her for three or four hours in the bathroom. Black eyes. Tied her up. Tore up a dress to tie her with. Put a knife to her throat. Wants answers about who she is with ….
>
> "… So we know, based upon the evidence, that the defendant is guilty of Count 1, which is spousal abuse …."

B. Discussion

The AAFV forms were admitted under the business records exception to the hearsay rule. Evidence Code section 1271[1] provides that evidence of a writing made as the record of an act, condition or event is not made inadmissible by the hearsay rule if the following four conditions are met: (1) the writing was made in the regular course of a business; (2) it was made at or near the time of the event; (3) the custodian or another qualified witness testifies about the writing's identity and mode of preparation; and (4) "[t]he sources of information and method and time of preparation were such as to indicate

---

[1] Unless otherwise specified, all statutory references are to the Evidence Code.

its trustworthiness." (§ 1271, subd. (d).) "The proponent of the evidence has the burden of establishing trustworthiness." (*People v. Beeler* (1995) 9 Cal.4th 953, 978.)

Defendant argues that admission of the AAFV forms to prove the truth of the contents asserted therein was erroneous because the AAFV forms did not qualify as business records. Defendant reasons that the employees who completed the AAFV forms did not have knowledge of the facts contained therein from personal observation. Rather, the contents were derived from hearsay statements made by Marisa, who did not have an official duty to observe and report the relevant facts. We agree. The AAFV forms are analogous to police reports, probation reports, psychiatric evaluations and emergency call logs, none of which qualify as business records because they contain hearsay statements made by participants and bystanders and inadmissible opinions and conclusions. (*Kramer v. Barnes* (1963) 212 Cal.App.2d 440, 446 [police reports]; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 239-240 [search result from database containing information derived from police reports]; *People v. Campos* (1995) 32 Cal.App.4th 304, 309-310 [probation report]; *People v. Reyes* (1974) 12 Cal.3d 486, 502-503 [psychiatric evaluation]; *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1203-1207 [911 dispatch log] (*Alvarez*).)[2]

The analytical flaw in the trial court's reasoning was its failure to recognize and address the fact that the AAFV forms contained multiple layers of hearsay. "When multiple hearsay is offered, an exception for *each* level of hearsay must be found in order

---

[2] We summarily reject the Attorney General's contention that this issue was not preserved for appellate review. Defense counsel argued that the AAFV forms constitute "double hearsay." The trial court expressly ruled that the AAFV forms would be admitted "with those objections." The objections to which the trial court referred include the hearsay point that is advanced on appeal. Defense counsel did not withdraw her hearsay objection after the court agreed to redact references to defendant's alcohol and drug use. Thus, the waiver argument fails for lack of record support.

for the evidence to be admissible. (Evid. Code, § 1201.)" (*Alvarez, supra,* 100 Cal.App.4th at p. 1205.) Marisa's statements to the AAFV employee was the first hearsay layer and the employee's recordation of those statements was the second hearsay layer. Esqueda's testimony sufficiently established that the employees who recorded the information were obligated to do so in an accurate manner. However, Esqueda's testimony did not establish the trustworthiness of Marisa's statements to the AAFV employees. It is undisputed that Marisa was not under an official duty to accurately report information. Therefore, Esqueda did not and could not lay a foundation sufficient to permit the AAFV forms to be admitted for the truth of the matters recorded therein.

The Attorney General's perfunctory argument that the AAFV forms were properly admitted as business records because "Esqueda expressly testified that case managers go over the forms with clients such as Marisa and have the clients sign them …, the clear inference being that the client makes sure that the case manager recorded the information accurately," suffers from the same analytical flaw. It is not the accuracy and trustworthiness of the employees' recordation that is being challenged, it is the accuracy and trustworthiness of Marisa, whose remarks were summarized and recorded by the employees in the AAFV forms.

Alvarez, supra, 100 Cal.App.4th 1190, which is relied on by defendant, cogently explains the applicable principle. There, the appellate court upheld the trial court's refusal to admit 911 dispatch logs under the business records or the official records exceptions to the hearsay rule. The reviewing court explained that the custodian of records could lay a foundation sufficient to prove that the 911 calls had been placed. "However, that testimony did not and could not lay a sufficient foundation to permit the records to be offered for the truth of the matter asserted in the calls by the individuals who telephoned the LAPD because those individuals were not under a duty to accurately report information. [Citation.]" (*Id*. at p. 1205.)

Alvarez found *People v. Baeske* (1976) 58 Cal.App.3d 775 (*Baeske*) illustrative. *Baeske* upheld the exclusion of a police report of a telephone call that had been received by the police from a neighbor of the victim as inadmissible hearsay. The *Baeske* court reasoned that the source of the information was not a public employee with a duty either to observe facts correctly or to report her observations accurately to the police department. Therefore, the trustworthiness requirement had not been satisfied. (*Baeske, supra*, 58 Cal.App.3d at pp. 780-781.)

By a parity of reasoning, we conclude that the AAFV forms were only admissible to establish that Marisa had telephoned the hotline on August 14 and that she had visited the shelter on August 19. Admission of the AAFV forms to prove the circumstances of the August incident was legal error. When offered for this purpose, the AAFV forms were inadmissible multiple hearsay. (*Alvarez, supra*, 100 Cal.App.4th at pp. 1205, 1207.)

However, admission of the AAFV forms did not cause a miscarriage of justice. First, the jury did not see the AAFV forms and the prosecutor only briefly referenced this evidence during her closing argument. Second, the content of the AAFV forms was largely cumulative to statements Marisa gave to police officers immediately following the August incident. Third, there was overwhelming evidence proving that defendant was guilty of spousal battery. He admitted during his testimony that he had repeatedly struck Marisa on the face. Photographs were admitted demonstrating her injuries. Defendant's claim that he inflicted the injuries in self-defense was not credible. Finally, the jury already demonstrated amazing lenity when it acquitted defendant of the false imprisonment and terrorist threat counts and found the deadly weapon use enhancements not true. Given the strength of the evidence against him, it is not reasonably probable that a result *even* more favorable to defendant would have been reached if the AAFV forms had been excluded. (*People v. Campos*, *supra*, 32 Cal.App.4th at pp. 308-309 [erroneous admission of probation report was nonprejudicial].)

II. Refusal to modify CALJIC No. 9.35 did not result in a defective jury charge; in any event, the asserted flaw is harmless beyond a reasonable doubt.

CALJIC No. 9.35 is the standard instruction on felony spousal battery. In relevant part, this instruction specifies that the application of force must have been "willfully inflict[ed]." CALJIC No. 16.140.1 is the standard instruction on the lesser included offense of misdemeanor spousal battery. In relevant part, this instruction states that the application of force must have been both willful and unlawful. A bracketed portion of this instruction provides that "[t]he use of force or violence is not unlawful when done in lawful [self-defense] …. The burden is on the People to prove that the use of force or violence was not in lawful [self-defense] …. If you have a reasonable doubt that the use of force or violence was unlawful, you must find the defendant not guilty." Both CALJIC No. 9.35 and CALJIC No. 16.140.1 were included in the jury charge. The jury was given the bracketed portion of CALJIC No. 16.140.1. When the court instructed the jury, it first read CALJIC No. 9.35, followed by CALJIC No. 16.140.1 and then CALJIC No. 9.35.1. Immediately thereafter, the court instructed on self-defense with CALJIC Nos. 5.30, 5.50, 5.51, 5.52 and 5.53.

During the instructional conference, defense counsel had asked the court to modify CALJIC No. 9.35 to specify that the application of force must have been both willful and lawful, mirroring CALJIC No. 16.140.1. Counsel argued, "[T]he word unlawfully requires the prosecution to prove beyond a reasonable doubt that the crime was not self-defense. So by deleting the word 'unlawfully,' it changes the burden of proof." The trial court decided that it would give CALJIC No. 9.35 in its standard form.

Defendant argues that the trial court erred by refusing to modify CALJIC No. 9.35 to specify that the application of force must have been "unlawful" as well as willful. He contends, "[b]ecause the evidence was sufficient to raise a reasonable doubt whether [he] acted in self-defense, it was incumbent upon the trial court to instruct the jury that the burden was on the People to prove that [his] use of force was unlawful," positing that the

jury could have attached significance to the difference between CALJIC No. 9.35 and CALJIC No. 16.140.1.

This argument fails because it violates the established precept that the adequacy of the jury charge must be determined from the entirety of the charge, not from a single instruction. (*People v. Frye* (1998) 18 Cal.4th 894, 957.) Jury instructions must be read together and understood in context as presented to the jury. (*People v. Rhodes* (1971) 21 Cal.App.3d 10, 20.) The jury was given CALJIC No. 1.01, which instructs it not to single out any individual instruction and ignore others. Jurors are presumed to be intelligent people, capable of understanding and correlating all instructions. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) The jury was instructed in the language of CALJIC No. 2.90 that the People bore the burden of proving guilt beyond a reasonable doubt and it was instructed on the principles of self-defense with CALJIC Nos. 5.30 and 5.50 to 5.53. Sensible jurors would have understood that the self-defense instructions applied equally to all of the charges that were based upon defendant's use of physical force and that the People bore the burden of proof. It is not reasonably possible that the failure to add the word "unlawful" to CALJIC No. 9.35 either misled the jury into believing that the self-defense instructions did not apply to the spousal battery charge or confused the jurors about the People's burden of proof.

We mention that the defendant would have been entitled, upon request, to an instruction stating that, "'[i]t is not necessary for the defendant to establish self-defense by evidence sufficient to satisfy the jury that the self-defense was true, but if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was justified, then he is entitled to an acquittal.'" (*People v. Adrian* (1982) 135 Cal.App.3d 335, 337 (*Adrian*).) This instruction is commonly known as the *Sanchez* instruction because the California Supreme Court ruled in *People v. Sanchez* (1947) 30 Cal.2d 560 (*Sanchez*) that it is erroneous to refuse a request for such a instruction. *Adrian* held that the instruction also applied to nonhomicidal assaultive crimes, ruling that a *Sanchez* instruction "must be

given upon request whenever the claim of self-defense has been properly tendered and the evidence warrants submitting the issue to the jury." (135 Cal.App.3d at p. 336.) Yet, under the circumstances presented here, defendant's request for addition of the word "unlawfully" to CALJIC No. 9.35 cannot reasonably be construed as tantamount to a request for a *Sanchez* instruction. Existing authority does not hold that there exists a sua sponte obligation to give a *Sanchez* instruction whenever a self-defense claim is raised and we decline to impose such a burden on the trial courts.

Furthermore, defendant was not prejudiced by the refusal to modify CALJIC No. 9.35 or by the absence of a *Sanchez* instruction, even when the omission is assessed under the stringent federal constitutional standard of harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; see *People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Both *Sanchez* and *Adrian* found the instructional omission harmless because other instructions adequately pinpointed the defense and the burden of proof. (*Sanchez*, *supra*, 30 Cal.2d at pp. 571-572; *Adrian, supra*, 135 Cal.App.3d at pp. 341-342.) The same is true in this case. In addition to giving the standard instructions on self-defense and the burden of proof discussed above, defense counsel was permitted to argue without objection that the prosecutor has the burden of proving beyond a reasonable doubt that "what happened was not self-defense." Even assuming error, there is no reasonable likelihood that under these facts the jury misapplied the law. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Additionally, as previously discussed, *ante,* in section I, defendant's claim that he repeatedly struck Marisa in self-defense is not credible and there is overwhelming proof that he is guilty of spousal abuse. It is not even remotely possible that it also would have acquitted him of spousal battery if the word "unlawfully"

had been added to CALJIC No. 9.35 or if a *Sanchez* instruction had been given. Thus, any possible instructional error is harmless.[3]

III. Admission of the 911 call did not infringe defendant's confrontation right and was not an abuse of judicial discretion.[*]

Defendant moved in limine to exclude evidence of the 911 call. The trial court denied the motion, as follows: "I did, in fact listen to the 911 tape in chambers, and it appears to me pretty clearly to be excited utterance.… It does appear to fall within the excited utterance exception of the hearsay rule." The audiotape of the 911 call was played for the jurors and they were provided with a written transcription of the conversation.

Defendant raises a dual-pronged challenge to admission of the 911 call. First, he argues that the caller's statements to the dispatcher were "testimonial" and therefore under the new rules for determining whether admission of evidence violates a criminal defendant's Sixth Amendment confrontation right that were announced in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] (*Crawford*), admission of the 911 call violated his confrontation right. Second, even if admission of the 911 call were not a confrontation right violation, the trial court abused its discretion when it concluded the 911 call qualified for admission under the excited utterance exception to the hearsay rule (also known as the spontaneous statement exception), which is codified at section 1240. As will be explained, neither line of attack is persuasive.

---

[3] If defendant had raised an ineffective assistance claim based on defense counsel's failure to request a *Sanchez* instruction, it would not have succeeded because defendant would not have been able to establish prejudice. (*In re Jackson* (1992) 3 Cal.4th 578, 604 [when ineffective assistance claim can be resolved solely on lack of prejudice, reviewing court need not determine whether counsel's performance was deficient].)

[*] See footnote, *ante*, page 1.

A pair of recent cases, *People v. Caudillo* (2004) 122 Cal.App.4th 1417 (petn. review filed Nov. 15, 2004) (*Caudillo*) and *People v. Corella* (2004) 122 Cal.App.4th 461 (*Corella*), have rejected *Crawford* based confrontation clause challenges to admission of 911 call evidence. *Caudillo* and *Corella* both explained that *Crawford* repudiated the line of authority holding that admission of a hearsay statement under a firmly rooted exception to the hearsay rule or when the statement bears particularized guarantees of trustworthiness did not violate a defendant's confrontation right. (See, e.g., *Ohio v. Roberts* (1980) 448 U.S. 56.) *Crawford* announced a new rule: the confrontation clause bars admission of out-of-court testimonial statements made by a witness to law enforcement officials unless the defendant has had a prior opportunity to cross-examine the witness and the witness is unavailable to testify at trial. (*Caudillo, supra*, 122 Cal.App.4th at pp. 1433-1435; *Corella, supra*, 122 Cal.App.4th at pp. 467-468.) *Crawford* did not define the term "testimonial," stating, in relevant part, that it encompasses "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford, supra*, 541 U.S. at p. __ [124 S.Ct. at p. 1364].) "The court also states that 'at a minimum' the term 'testimonial' applies 'to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.'" (*Corella*, *supra*, 122 Cal.App.4th at p. 468.) Although *Crawford* did not define the term "police interrogation" it "analogize[d] a police interrogation to the official pretrial examination of suspects and witnesses by English justices of the peace before England had a professional police force. [Citation.] The analogy indicates that, under *Crawford*, a police interrogation requires a relatively formal investigation where a trial is contemplated." (*Ibid*.)[4]

---

[4] Two *Crawford* related cases are pending in the California Supreme Court. In

Corella and *Caudillo* both concluded that the 911 calls at issue did not constitute police interrogation and that the calls were not "testimonial" within the meaning of *Crawford*. *Corella* reasoned that the statements in the telephone call "were not 'knowingly given in response to structured police questioning,' and bear no indicia common to the official and formal quality of the various statements deemed testimonial by Crawford." (*Corella, supra*, 122 Cal.App.4th at p. 468.) The police did not initiate the call. "Not only is a victim making a 911 call in need of assistance, the 911 operator is determining the appropriate response, not conducting a police interrogation in contemplation of a future prosecution." (*Ibid*.) *Caudillo* contains a more in-depth analysis of the issue. After discussing recent post-*Crawford* cases in this jurisdiction addressing related but distinguishable situations[5] and several post-*Crawford* cases from New York finding that a 911 call is not testimonial, the *Caudillo* court concludes that the 911 call at issue was not testimonial for the following reasons: "The call here was initiated by a citizen witness to a crime; it was not initiated by the government or an agent of the government. The details provided by the caller were elicited in order to facilitate appropriate police response, not to provide evidence to be used at a later trial." (*Caudillo, supra*, 122 Cal.App.4th at p. 1440.)

People v. Cage, review granted October 13, 2004, S127344, and *People v. Adams*, review granted October 13, 2004, S127373, our high court will determine whether certain statements given to police officers are "testimonial."

5 *Caudillo* discussed the following recent California cases: *People v. Pirwani* (2004) 119 Cal.App.4th 770 (videotaped statement by victim to law enforcement official is testimonial); *People v. Sisavath* (2004) 118 Cal.App.4th 1396 (sexual abuse victim's statement to trained interviewer is testimonial); *People v. Cervantes* (2004) 118 Cal.App.4th 162 (friend's statement to police about admissions codefendant had made to him was not testimonial).

We agree with the reasoning and result of *Corella* and *Caudillo* and similarly conclude that the 911 call at issue here was not "testimonial." The 911 call was placed by a citizen who wished to secure assistance for an apparently injured woman. There is no indication that the caller was thinking about whether his statements would be used at a later trial. The dispatcher's questions were designed to elicit information from which he could decide what assistance to dispatch, not to obtain evidence to be used at a later trial. In response to the dispatcher's question whether Marisa told the caller "who did this to her," the clerk replied, "[S]he's really not able to talk too well." The dispatcher answered, "Okay, no problem, they're on the way" and terminated the conversation. "Under the circumstances of this case, we believe that the admission of the 911 call did not violate the Confrontation Clause." (*Caudillo, supra*, 122 Cal.App.4th at p. 1440.)

Defendant's challenge to the trial court's exercise of discretion is similarly unconvincing. *People v. Gutierrez* (2000) 78 Cal.App.4th 170 (*Gutierrez*) explains the requirements that must be met in order for the excited utterance exception to apply to hearsay evidence such as the contents of a 911 call. First, there must have been an occurrence startling enough to produce nervous excitement and produce unreflecting statements. Second, the statements must have been made before there was time to contrive and misrepresent. Finally, the statements must relate to the circumstances of the occurrence that preceded them. (*Id*. at p. 177; see also *People v. Farmer* (1989) 47 Cal.3d 888, 901.) The decision whether to admit hearsay evidence under this exception falls within the trial court's broad grant of judicial discretion. (*People v. Hines* (1997) 15 Cal.4th 997, 1034-1035, fn. 4.)

Defendant does not cite any case overturning admission of a 911 call as an abuse of discretion. On the contrary, numerous cases have upheld admission of 911 calls as falling within the parameter of the excited utterance exception. *Caudillo* and *Corella* both concluded that the 911 calls at issue satisfied the requirements of section 1240. (*Caudillo, supra*, 122 Cal.App.4th at pp. 1430-1432; *Corella, supra*, 122 Cal.App.4th at

pp. 466-467.) Earlier, in *People v. Roybal* (1998) 19 Cal.4th 481, 516, our Supreme Court upheld admission of a 911 call placed by the victim's husband and in *People v. Farmer, supra,* 47 Cal.3d at pages 903 to 905 it upheld admission of a 911 call placed by the victim and statements the victim made to a responding police officer.

We have reviewed the audiotape and transcript of the 911 call and are satisfied with the reasonableness of the trial court's conclusion that the store clerk's statements to the dispatcher satisfied the requirements of section 1240. The 911 call was placed immediately after Marisa entered the store and asked for help. Her arrival certainly qualifies as an exceptional event. While we may or may not agree with the trial court's conclusion the caller sounded "pretty … excited," that is not important. We do not find the court abused its discretion in so finding. (*People v. Farmer, supra*, 47 Cal.3d at p. 904.) The dispatcher's testimony that there was not anything "unusual" about the caller's tone of voice is not significant because it is not unusual for people who are speaking with an emergency dispatcher to manifest all types of behavior.

IV. BWS evidence had adequate evidentiary foundation; CALJIC No. 9.35.1 did not direct the jury to presume that Marisa's reactions were consistent with abuse.*

Over defense objection, the trial court permitted Shafter Police Detective Chris Jackson to testify as an expert on BWS. He described the perceptions of battered women that cause them to remain in abusive relationships, to recant reports of physical abuse and to try to protect the abuser from the legal repercussions of their conduct. The court gave CALJIC No. 9.35.1, which is a cautionary instruction concerning the limited purpose for which BWS evidence may be considered.[6] The instruction was given in its standard form; optional language was not given.

---

* See footnote, *ante*, page 1.

[6] As given, CALJIC No. 9.35.1 provides:

Relying on P*eople v. Gomez* (1999) 72 Cal.App.4th 405 (*Gomez*), defendant argues that admission of expert testimony about BWS was erroneous because the record does not contain proof that Marisa actually suffered from this psychological condition. Defendant asserts that proof of abuse is insufficient. Absent proof that the victim actually suffers from BWS, such expert testimony improperly invites the jury to convict the defendant based upon conjecture and speculation, because it assumes that the victim was abused and that the victim suffers from BWS.[7] He also argues that CALJIC No. 9.35.1 impermissibly directs the jury to assume that Marisa's reactions were not inconsistent with having been abused. As will be explained below, neither contention is persuasive

---

"Now, evidence has been presented to you concerning battered women's syndrome. This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged.

"Battered women's syndrome research is based upon an approach that is completely different from the approach which you must take in this case.

"The syndrome research begins with the assumption that physical abuse has occurred and seeks to describe and explain common reactions of women to that experience. As distinguished from that research approach, you are to presume the defendant innocent. People have the burden of proving guilt beyond a reasonable doubt.

"Now, you should consider this evidence for certain limited purposes only. Namely that the alleged victim's reactions as demonstrated by the evidence are not inconsistent with her having been physically abused or the beliefs, perception, or behavior of victims of domestic violence."

[7] We have assumed for purposes of this discussion only that defendant's challenge to admission of BWS evidence was adequately preserved for appellate review. Our substantive rejection of the BWS challenge obviates any need to address defendant's related ineffective assistance of counsel argument because the ineffective assistance claim is premised on the view that defense counsel had not preserved substantive review of this evidentiary decision. Having concluded that BWS evidence was properly received, defendant's associated ineffective assistance claim necessarily fails.

Recently, in *People v. Brown* (2004) 33 Cal.4th 892 (*Brown*), our Supreme Court concluded that BWS testimony is admissible and has adequate factual foundation when there is independent evidence of abuse "suggest[ing] the possibility" that the accused and the victim "were in a 'cycle of [domestic] violence.'" (*Id*. at p. 907.) Evidence of prior incidents of abuse other than the charged offense is not required. *Brown* expressly disapproved of any contrary language in *Gomez, supra*, 72 Cal.App.4th 405. (*Brown*, 38 Cal.4th at p. 908.) *Brown* also upheld the legality of CALJIC No. 9.35.1. (*Id*. at p. 902.) This court is bound to adhere to our Supreme Court's decisions. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Following and applying *Brown, supra*, 22 Cal.4th 892, we conclude that foundational requirements were met when the People produced independent evidence such as Marisa's statement to the police from which a reasonable trier of fact could conclude that defendant and Marisa were locked in a cycle of violence. As explained in *Brown,* "[o]nce there is evidence from which the trier of fact could find the charges true, evidence relating to the credibility of the witnesses becomes relevant and admissible." (*Id*. at p. 908.) The People were entitled to offer testimony about the typical behavior of domestic abuse victims in order to challenge the automatic assumption some jurors might make that a victim of abuse would not try to protect her abuser. If unchallenged by expert BWS testimony, such an assumption would tend to show that Marisa was being untruthful. Thus, Officer Jackson's testimony was directly relevant to Marisa's credibility and was admissible without regard to whether there was evidence proving that she had been diagnosed as suffering from BWS.

Defendant's challenge to the legality of CALJIC No. 9.35.1 is similarly unconvincing. In *Brown*, the defendant argued "that by stating that research begins with the assumption that physical abuse has occurred, CALJIC No. 9.35.1 implicitly assumes that the defendant is guilty." (*Brown, supra*, 33 Cal.4th at p. 902.) The high court "disagree[d]; the instruction expressly says that the jury is not to assume guilt, but 'to

presume the defendant innocent.'" (*Ibid*.) Similarly here, defendant argues that the instruction improperly assumes that Marisa's actions were consistent with having been physically abused. Not so; the instruction specifically informs the jury that BWS research begins with the assumption that physical abuse has occurred. It then states, "[a]s distinguished from that research approach, you are to presume the defendant innocent. People have the burden of proving guilt beyond a reasonable doubt." Thus, CALJIC No. 9.35.1 does not expressly or impliedly direct the jury to accept Officer Jackson's testimony about BWS. Rather, it directs the jurors to decide whether the abuse occurred and it reminds them that the People bear the burden of proof beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

_____
Buckley, Acting P.J.

WE CONCUR:

_____
Cornell, J.

_____
Gomes, J.